In the
Supreme Court of the United States

October Term 1961

No. 358

LAUREANO MAYSONET GUZMAN,
PETITIONER,

v.

RAMON RUIZ PICHIRILO,
RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONER

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Opinions Below

The opinion of the District Court, D.P.R., Hale-Navarro, D.J., (R. 17-19), does not appear in the Official Reporter. The opinion of the Court of Appeals (R. 23-27), is reported at 289 F. 2d 612.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered May 29, 1961 (R. 28). Petition for a Writ of Certiorari was filed on August 25, 1961 and was granted, November 6, 1961 (R. 29).

The jurisdiction of this Honorable Court to review the final judgment of the United States Court of Appeals for the First Circuit is provided by Sections 1254 (1) and 2101 (e) of Title 28, U. S. Code.

Constitutional and Statutory Provisions

The constitutional provisions involved are:

United States Constitution, Article 3, Section 2:

"The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

The statute involved is:

Laws of Puerto Rico Annotated, Title 11, Section 2:

"When an employer insures his workmen or employees in accordance with this chapter, the right

herein established to obtain compensation shall be the only remedy against the employer; but in case of accident to, or disease or death of, the workmen or employees not entitled to compensation under this chapter, the liability of the employer is, and shall continue to be, the same as if this chapter did not exist."

Statement of the Case

The petitioner, a longshoreman, was injured on board the M/V CARIB, of Dominican registry, when the shackle on the boom broke causing it to fall and strike him on the head. He sustained severe and permanent injuries. Suit was commenced in the United States District Court for the District of Puerto Rico, in Admiralty, by a libel filed on December 5, 1958.

Jurisdiction was based on the admiralty and maritime jurisdiction of the United States and both *in rem* and *in personam* remedies were sought against the vessel and the owner. The vessel was seized, pursuant to lawful process on December 10, 1958. The vessel and owner appeared on December 23, 1958 by filing a claim in the form of a motion.

In the answer, the respondents averred that the vessel had been "chartered" to Bordas & Co., of San Juan, Puerto Rico, the stevedore employer of the petitioner. The affirmative defenses alleged, inter alia, the receipt of compensation by petitioner, and the charter and surrender of control of the area wherein the accident occurred.

Introduced into evidence at the trial was a deposition of the master, a Dominican, who characterized himself as an employee of the respondent and referred to the stevedore as a third-party, incorrectly translating its name into Spanish. Aside from a physician, the only witness who

appeared for the respondents was the principal officer of the stevedore employer. He testified:

> "Q. Will you please state your connection with Ruiz Pichirilo in this case? A. He has been a business relation of ours for many years. We have been managing and operating the "Carib" for around five years. He lives in the Dominican Republic." (R. 13).

At the close of all the testimony, respondent's proctor requested time to file a memorandum based on the defense that Ramon Ruiz Pichirilo was not liable because he had no control of the vessel. Thereupon the following colloquy took place:

> "The Court: Of course, you know pretty well the doctrine in Admiralty that there is a non-delegable duty, no matter who was managing this thing, or who was paying for the payroll and expenses and everything. Mr. Bordas clearly stated that the boat belongs to Pichirilo, and if Pichirilo isn't coming here it is because he can not leave the Dominican Republic, but he is the owner, the operator of the boat.
>
> "Mr. Rodriquez: No, the owner, not the operator. The operator is Bordas and Company.
>
> "The Court: That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 17).

No contracts, charter parties nor any other document corroborating Bordas' interest in the vessel was offered. In its opinion the District Court stated that it could find no lawful basis for holding that the vessel was under a demise charter (R. 19) and in its findings found that the

owner was in possession and control of the M/V CARIB. (R. 20).

The United States Court of Appeals did not question the fact that the vessel was unseaworthy. The reversal was predicated upon this Court's interpretation that the evidence showed a demise charter by parole and could admit no other interpretation. A demise charterer being *pro haec vice* the owner, the Court of Appeals reasoned, the true owner could not be liable *in personam*. Despite the fact that the demisee created the unseaworthy condition, it could not be liable *in personam* because as stevedore-employer it was insulated by the exclusive remedy provisions of the Workmen's Accident Compensation Act of Puerto Rico.

The Court of Appeals then held that a vessel could not be liable *in rem*, if there were no *in personam* liability, even if the vessel were unseaworthy and it ordered the dismissal of the libel.

This appeal is based upon the irreconcilability of the holding by the Court of Appeals with the decision of the United States Court of Appeals for the Second Circuit and with decisions of several District Courts. Petitioner maintains that the opinion appealed from violates the teachings of authoritative decisions of this Court.

Questions Presented

1. Is a vessel in the possession and control of a demise charterer liable *in rem* for injuries to a longshoreman caused by the unseaworthiness of the vessel, if the unseaworthy condition is created while the demise charterer is in possession and control, and if the demise charterer is also the stevedore-employer insured under a system of workmen's compensation?

2. Does the Court of Appeals have the power to reverse findings of fact, based in whole or in part upon the credibility of witnesses, in an admiralty matter on its own independent reading of the record?

Argument

I. An Injury to Person or Property Resulting from the Unseaworthiness of a Vessel Gives Rise to Liability *In Rem*, Independent of Any *In Personam* Liability.

The petitioner, a longshoreman, was performing services on behalf of the ship when he was struck by the falling boom. The warranty of seaworthiness extended to him.[1] The shackle, although new, broke and the vessel was thus unseaworthy.[2] It would not have mattered if the shackle had been brought aboard by the stevedore,[3] or that no notice of the condition was conveyed to the shipowner.[4]

The owner and his vessel were liable to respond for the unseaworthiness[5] because the obligation is one the owner cannot delegate,[6] even if the vessel is under charter.[7]

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[1] *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099; *The State of Maryland*, C.C.A. 4th, 1936, 85 F. 2d 944.

[2] *Mahnich* v. *Southern Steamship Co.*, 1944, 321 U.S. 96, 64 S. Ct. 445, 88 L. Ed. 561; *Seas Shipping Co.* v. *Sieracki*, *supra*. It is to be noted that the manner in which the injury occurred is nearly identical to the facts in *Sieracki*.

[3] *Alaska S.S. Co., Inc.* v. *Petterson*, 1954, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798; *Rogers* v. *United States Lines*, 1954, 347 U.S. 984, 74 S. Ct. 849, 98 L. Ed. 1120.

[4] *Mitchell* v. *Trawler Racer, Inc.* 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

[5] *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760.

[6] *Seas Shipping Co.* v. *Sieracki*, *supra*.

[7] *Grillea* v. *United States*, 2 Cir. 1954, 232 F. 2d 919, *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U.S. 423, 79 S. Ct. 445, 3 L. Ed. 2d 413.

The absolute liability of the owner has been softened by allowing him to recover indemnity from the third party responsible for creating or bringing the unseaworthy condition into play,[8] regardless of the existence of a direct contractual relation between the shipowner and the creator of the unseaworthy condition or *of the existence* of a contract of indemnity.[9]

In spite of this body of law, the Court of Appeals for the First Circuit denied the petitioner his right to recover, although conceding that the injury resulted from unseaworthiness.[10] It held that the maritime lien was defeated because the owner-demisor had no personal liability and neither did the charterer because he was insulated by exclusive workmen's compensation[11] and without *in personam* liability there was no liability *in rem*.

The personification of a vessel may have feudal origins,[12] but the doctrine is useful and logical[13] and recognized by this Court.[14] A vessel does not contract for services, navigate, load and discharge, pay wages or injure persons or property by itself. Human hands will and must control (or fail to control) its every operation. But if the ship does not answer for the contractual liabilities rendered on its behalf or for the damages caused by negligence or unseaworthiness, the victim may have an action without a remedy.

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[8] *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic S.S. Corp.*, 1956, 350 U.S. 85, 76 S. Ct. 232, 100 L. Ed. 133; *Crumady* v. *The Joachim Hendrich Fisser*, *supra*.

[9] *Waterman Steamship Corporation* v. *Dugan & McNamara, Inc.*, 1960, 364 U.S. 421, 81 S. Ct. 200, 5 L. Ed. 2d 169.

[10] *Ruiz Pichirilo* v. *Maysonet Guzman*, 1 Cir. 1961, 290 F. 2d 812, at 813.

[11] 11 L.P.R.A. 21

[12] *Burns Bros.* v. *The Central R.R. of New Jersey*, 2 Cir. 1953, 202 F. 2d 910.

[13] *Holmes, The Common Law* (1881) 26-27.

[14] *Canadian Aviator Ltd.* v. *United States*, 1945, 324 U.S. 215, 65 S. Ct. 639, 89 L. Ed. 901.

For this reason, this Court has imposed liability upon the vessel itself, even in circumstances wherein the owner had no personal responsibility. Ships have been forfeited for statutory violations[15] and piracy[16] without privity or knowledge on the part of the owner. Damages caused by the negligence of a compulsory pilot devolve upon the vessel.[17]

Likewise, a vessel must respond *in rem* for damage caused during a demise charter. When this question first came before this Court, it had been taken for granted that *in rem* liability existed and the only issue litigated was whether the owner or demisee bore the ultimate responsibility under the charter party.[18]

In a recent decision, treating of a scow which capsized during a demise, the Court said:

> "It is hornbook law that a maritime lien arises in favor of a party injured by the negligence of anyone lawfully in control of a vessel. This result follows despite the fact that the owner has absolutely no control over the vessel. See Robinson on Admiralty, pp. 363-368; The Law of Admiralty by Gilmore and Black, Ch. IX (3), p. 494; The Barnstable, 1901, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954; Burns Bros. v. Central R.R. of New Jersey, 2 Cir., 1953, 202 F. 2d 910; The Stamford, D.C.S.D.N.Y. 1929, 35 F. 2d 55. The main opinion held that there was an unrebutted presumption of negligence upon the

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[15] *The Little Charles*, C.C.D. Va. 1818, 26 Fed. Cases 979, Case No. 15,612.

[16] *The Palmyra*, 1827, 25 U.S. (12 Wheat.), 1, 6 L. Ed. 531; *United States v. The Malek Adhel*, 1844, 43 U.S. (2 How.), 210, 11 L. Ed. 239.

[17] *The China*, 1868, 74 U.S. (7 Wall.) 53, 19 L. Ed. 67.

[18] *The Barnstable*, 1901, 181 U.S. 464, 21 S. Ct. 684, 45 L. Ed. 954.

part of the charterer in whose possession the vessel lawfully was. Under those circumstances, a maritime lien arises in favor of those injured through that negligence, namely, the claimants. . . . . ., or, stated in another way, the vessel is liable *in rem* to those claimants."

Rice v. New York Trap Rock Corporation, D.C.S. D.N.Y. 1959, 198 F. Supp. 346 at p. 351.[19]

The vessel is liable for injuries to seamen *in rem*,[20] and this Court has recently upheld decrees in favor of longshoremen injured on demised vessels.[21]

The sole basis for destroying the petitioners maritime lien is the fact that the charterer was also the stevedore-employer whose exclusive liability to its employees was circumscribed by statute. The authority marshalled by the court below to sustain the proposition that there is no *in rem* liability without a correlative *in personam* liability, is, with one exception, inapposite.

In both the *Queen of the Pacific*, 1901, 180 U.S. 49, 21 S. Ct. 278, 45 L. Ed. 419, and *The Oceanica*, C.C.A. 2d 1909, 170 F. 893, cert. den. 215 U.S. 599, 30 S. Ct. 400, 54 L. Ed. 343, the shipowner had been relieved of responsibility by contract, and it was held that his property was likewise relieved from seizure. A contract such as was involved in *The Oceanica*, may, today, be unenforceable,[22]

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[19] affirmed, sub. nom. *In Re Rice's Petition*, 2 Cir. 1961, 294 F. 2d 272.

[20] "That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appertinent to the ship." *The Osceola*, 1903, 189 U.S. 158, 175.

[21] *Connelly v. The Josephine Knickerbocker Plover*, supra, *Waterman Steamship Corporation v. Dugan & Hoffmann, Inc.* supra.

[22] *Sieracki v. Seas Shipping Corporation*, 1946, 328 U.S. 85, 75 S. Ct. 620, 99 L. Ed. 911.

but even were it valid, we do not comprehend the applicability of such a holding to the case at bar. The longshoreman didn't and couldn't contract away his right to a seaworthy vessel, and according to the cases the obligation of the shipowner to provide a seaworthy vessel is absolute.

It is true that *The Western Maid*, 1922, 257 U.S. 419, 42 S. Ct. 159, 66 L. Ed. 299, held that no *in rem* liability could be imposed even though the claim was for collision damage. During the first World War the United States was the absolute owner or demise charterer of several vessels that caused damage. After the end of hostilities the vessels were either sold or returned to their original owners. Until that moment no suit could have been brought because the government had not consented to be sued.[33] When the vessels reached private hands, suits were instituted and this Court issued prohibitions against their sale by judicial decree. Although the language of the decision has been criticised,[34] the Courts have regarded the decisions as limited to cases involving the sovereign.[35] Justice Holmes, never intended that it apply to cases such as the one on appeal for he said:

> "It may be said that the persons who actually did the act complained of may or might be sued and that the ship for this purpose is regarded as a person. But that is a fiction not a fact and as a fiction is the creation of the law. It would be a strange thing if the law created a fiction to accomplish the result supposed. It is totally immaterial that in dealing with private wrongs the fiction, however originated, is in force." *The Western Maid*, 257 U.S. 419 at 433.

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[33] This situation has been altered by the enactment of the Public Vessels Act, 46 U.S.C. 781, et seq.

[34] Hough, *Admiralty Jurisdiction of Late Years*, 37 Harv. L. Rev. 1924; Gilmore and Black, *The Law of Admiralty*, pp. 500-507.

[35] Grillea v. *United States*, 2 Cir. 1926, 232 F. 2d 919, 923.

It is suggested that not only have the facts been stretched but also that logic has been twisted to enable *The Western Maid* to have any application to this case. The personality of the vessels in *The Western Maid* had merged in the sovereign, who was immune from suit and incapable of passing imperfect title. However, a maritime lien arose against the M/V CARIB and our demise charterer is no sovereign.

Two other authorities cited by the Court of Appeals are, it is submitted, equally inapplicable. *Noel* v. *Isbrandtsen Company*, 4 Cir. 1961, 287 F. 2d 783 and *Pedersen* v. *The Bulklube*, D.C.E.D.N.Y. 1959, 170 F. Supp. 462, affirmed per curiam 274 F. 2d 824, cert. denied 364 U.S. 814, 81 S. Ct. 44, 5 L. Ed. 2d 46 are cases which revolve about the questions of status of the vessel, status of the injured party, and whether the warranty of seaworthiness is applicable. In determining whether there is such a warranty one must first look to the status of the vessel.[26] It was determined in both cases that the ship was not in navigation and that the warranty of seaworthiness was not applicable.[27]

Furthermore, whether the injured party was entitled to the warranty of a seaworthy vessel was questioned in each case, for Noel was a surveyor and Pedersen, a shipyard rigger.[28] In *Noel*, the court found no negligence and being no warranty of seaworthiness, the libel was dismissed. This is not a negation of the principles enunciated by Judge Learned Hand in *Grillea v. United States*.[29] Judge Sobeloff, writing for the Court of Appeals for the Fourth Circuit, said:

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[26] *West* v. *United States*, 1959, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161.

[27] *Roper* v. *United States*, 1961, U.S. , 82 S. Ct. 5, L. Ed. 2d.

[28] *United New York and New Jersey Sandy Hook Pilots Ass'n.* v. *Halecki*, 1961, 358 U.S. 613, 79 S. Ct. 517, 3 L. Ed. 2d 541.

[29] 232 F. 2d 919.

"It is one thing to hold that a conviction or liability *in personam* is not a condition precedent to the action *in rem;* it would be quite another to say that the vessel may be held accountable as an entity when there has been no violation of the warranty of seaworthiness or a breach of duty on the part of anyone."

287 F. 2d 783 at page 786.[30]

Similarly, Pederson was engaged on a ship withdrawn from navigation and not entitled to a seaworthy vessel. The negligence which occasioned the injury was the negligence of his employer. The shipowner could only have been liable for the negligence of the employer if he had exercised control and possession.[31]

No one has denied that the vessel in the instant case was unseaworthy; nor has anyone denied that the petitioner was within the class to be protected by this humanitarian doctrine. The maritime lien arose immediately upon the breach of duty, whereas in the cited cases there was no duty.

In opposition to the petition for certiorari, the respondent cited several cases of this Court in support of the proposition that one cannot apply the property of one who bears no responsibility.[32] These cases answered ques-

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[30] In *Latus v. United States*, 2 Cir. 1960, 277 F. 2d 264, Judge Learned Hand said: "We can find no decision in which such a lien has been imposed on a ship for the fault of another person than the owner, when that fault is not that of a 'bare-boat' charterer, or some specified class of persons like a compulsory pilot. . . . Grillea v. United States, 2 Cir., 232 F. 2d 919 merely held that a longshoreman might sue a ship *in rem* if he was injured by her unseaworthiness, which no one denies."

[31] *Kermarec v. Compagnie Generale Transatlantique*, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550.

[32] Brief for respondent in opposition to petition for certiorari, pp. 7-8.

tions that were either procedural[33] or involving interpretations of particular statutes that limited liability.[34] They did not intend to destroy the historic difference and distinction between admiralty actions *in personam* and those *in rem*.[35] Nor do we suppose that they intended to destroy the absolute non-delegable duty of the shipowner to provide those persons who did the traditional work of a seaman with a seaworthy vessel.

The only case which may be said to be a precedent for the holding of the court below is *Vitozi* v. *S.S. Platano*, D.C.S.D.N.Y. 1948, 1950 A.M.C. 686.[36] Originally, the longshoreman in that case had sued the shipowner *in personam* but had been told that only the demise charterer was liable for unseaworthiness.[37]

In the *in rem* action, Vitozi was again advised that he had no claim, because the demise charterer's liability was exclusively the compensation owed under the statute[38] and the vessel being his under the demise was not a third party within the meaning of the statute.

In *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, the majority held, "The legislation therefore did not nullify any right of the longshoreman against the owner of the ship, except possibly in the instance, presumably rare, where he may be hired by the owner."[39] This limited exception was preceded by this admonition:

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[33] *Continental Grain Company* v. *The FBL—585*, 1960, 364 U.S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540.

[34] *The City of Norwich*, 1886, 118 U.S. 468, 6 S. Ct. 1150, 30 L. Ed. 134; *Consumers Import Co.* v. *Kabushiki Kaisha Kawasaki Zosenjo*, 1963, 320 U.S. 249, 64 S. Ct. 15, 88 L. Ed. 20.

[35] Dissenting opinion in *Continental Grain Company* v. *The FBL-585*, supra, 364 U.S. 19, at pp. 37-38.

[36] Not officially reported.

[37] *Vitozi* v. *Suffren Shipping Co.*, C.C.A. 1st, 1967, 163 F. 2d 986.

[38] 33 U.S.C.A. 905

[39] 328 U.S. 85 at p. 102

"It is a form of absolute duty owing to all within the range of its humanitarian policy.

"On principle we agree with the Court of Appeals that this policy is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection."[40]

The limited exception alluded to in Sieracki had some authority[41] and has continued to be applied in those cases where the actual owner is also the stevedore-employer.[42] We assume that the result should be the same under the workmen's compensation status involved herein,[43] which unquestionably applies to petitioner.[44]

Until the decision in the court below, *Vitozi* was the only case that held that the demisee was such an owner than *in rem* liability could not be imposed. But it was not the only case in which the question arose. The principles of both *Vitozi* cases were contradicted by the United States Court of Appeals for the Second Circuit with this language:

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[40] 328 U.S. 85 at p. 95

[41] *Samuels* v. *Munson S.S. Line*, C.C.A. 5th, 1933, 63 F. 2d 861.

[42] *Smith* v. *S.S. Mormacdale*, 3 Cir. 1953, 198 F. 2d 849, cert. denied 345 U.S. 908, 73 S. Ct. 648, 97 L. Ed. 1344; *Bennett* v. *The Mormacteal*, *D.C.E.D.N.Y.* 1957, 160 F. Supp. 840, affirmed 254 F. 2d 138, cert. denied, 358 U.S. 817, 79 S. Ct. 26, 3 L. Ed. 2d 59.

[43] 11 L.P.R.A. 1 et seq.

[44] *Guerrido* v. *Alcoa Steamship Co.*, 1 Cir. 1956, 234 F. 2d 349.

"If the demisee becomes liable for breach of warranty of unseaworthiness, a maritime lien arises upon the ship securing the obligee. Regardless of whether such lien arises when the demisee becomes liable for other default, we cannot doubt that one does arise when, as here, the liability is imposed in lieu of a warranty of seaworthiness, and upon the theory that, even where there is such a warranty, the resulting liability sounds in tort. Since the lien extends to unseaworthiness supervening after delivery, as well as that already existing, the owner demisor, so far as his ship will answer, is initially subject to a larger liability than is subject to under the putative imposed liability, although in cases of supervening unseaworthiness the eventual loss would no doubt fall on the demisee."

Cannella v. *Lyke Bros. S.S. Co.*, 2 Cir. 1949, 174 F. 2d 794, at p. 796, cert. denied 338 U.S. 859, 70 S. Ct. 102, 94 L. Ed. 526.

Today the Court of Appeals for the First Circuit, in the light of the *Cannella* opinion, admits it may have erred in *Vitozi* v. *Balboa Shipping Co.*, C.C.A. 1st, 1947, 163 F. 2d 286, but only as to cases where the unseaworthy condition preceded the demise.[48] Why there should be a distinction between unseaworthiness arising before or after the demise is unexplained. In either case the lien arises while the demisee is in possession and in either case the owner has the same interest in the vessel.

Burns Bros. v. *Central R.R. of New Jersey*, 2 Cir. 1953, 202 F. 2d 910, although not identical, involved parallel issues. In that case, libellant's barge was negligently in-

[48] 290 F. 2d 812 at page 814.

jured by a carfloat owned by Central Railroad of New Jersey which was being operated by the Long Island Railroad. At the time, Central Railroad was undergoing reorganization, so that process *in rem*, might not have been obtainable. After a decree *in personam* was rendered against Long Island, it went into reorganization. The libellant was then in the same position as the petitioner is here. Central had no *in personam* liability and Long Island had its liability limited. A subsequent suit *in rem* was permitted because a lien had arisen, by the violation of duty by one in control.

In *Grillea* v. *United States*, 2 Cir. 1956, 232 F. 2d 919, a longshoreman employed by the demisee was permitted to recover because of the unseaworthiness of the vessel. The principle enunciated in *Grillea* was labeled "novel" in the court below. The novelty of *in rem* liability for unseaworthiness causing personal injuries is at least as old as *The Osceola*, 1903, 189 U.S. 158, 23 S. Ct. 483, 47 L. Ed. 760. We suggest that Grillea is not "novel", but that the doctrine of absolute liability for unseaworthiness is still unpalatable in some quarters.[46]

Faced with the choice between *Vitozi* v. *S.S. Platano*, *supra*, and *Grillea* v. *United States*, a District Court in the Third Circuit chose the latter, holding that a mere bareboat charter to the stevedore-employer could not destroy the injured longshoreman's maritime lien. The court answered the respondent's contention that the lien was being imposed against the property of the employer who was exonerated from all other liability through the exclusivity of compensation, by saying:

> "We simply point out that whatever bundle of rights in the ship the real owner surrenders under

[46] *Mitchell* v. *Trawler Racer, Inc.*, 1 Cir. 1959, 265 F. 2d 426, reversed 1960, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941.

a bareboat charter, he does retain the right to the return of his ship at some future time. . . . . .

"Moreover, the question of operation and control of the ship would appear to have no real significance in an in rem action for unseaworthiness, since unseaworthiness is not based upon negligence or any wrongful act. Rather it is a form of absolute liability which is imposed regardless of fault. Seas Shipping Co. v. Sieracki, supra. Therefore we are not particularly persuaded by the nature of a bareboat charter. This fact might be more evident if we imagine a case with the exact same facts as the present one, the only difference being that the bareboat charter contained no indemnity clause. In such a suit the charterer would not (as it did here) move to strike the real owner of the vessel as respondent and itself defend the action. Yet the real owner undoubtedly could not set up the Longshoremen's and Harbor Workers' Act as a bar to recovery. The only difference between such a case and our own is the indemnity clause, which the Supreme Court has said is not determinative. See, Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., supra"[47]

Reed v. *The Yaka*, D.C.E.D. Penna., 1960, 183 F. Supp. 69 at page 76.

The precise question before the Court was presented in New York as well in the case of *Leotta* v. *The S.S. Esparta*, D.C.S.D. N.Y., 1960, 188 F. Supp. 168. Again *Vitozi* was rejected. It was reasoned that despite the fact that a demisee is owner *pro haec vice*, it is *only pro haec vice*. There is, and can be, no complete identity between

[47] It is to be noted that the defense herein was conducted by the charterer who did set up compensation as a bar.

the ship and demise-employer as in the case where the employer is the actual shipowner.

Several of the Justices of this Court were reluctant to concur in the *Ryan Stevedoring* case[48] for fear that the placing of ultimate responsibility on the stevedore on the basis of breach of warranty of workmanlike performance would vitiate the underlying basis for the unseaworthiness doctrine as expressed in *Sieracki*.[49]

When the protective scope of the unseaworthiness doctrine was broadened to include longshoremen, this Court observed:

> "Nor does it follow from the fact that the stevedore gains protections against his employer appropriate to the employment relation as such, that he loses or never acquires against the shipowner the protections, not peculiar to that relation, which the law imposes as incidental to the performance of that service. Among these is the obligation of seaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workman within the scope of its policy."

Seas Shipping Co. v. *Sieracki*, supra, 328 U.S. 85 at page 100.

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[48] *Ryan Stevedoring Co.*, v. *Pan Atlantic S.S. Corp.*, 1956, 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133.

[49] "These (hazards of marine service) together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and to require putting their burden, in so far as it is measurable in money, upon the owner regardless of his fault. These risks are available by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost." *Seas Shipping Co.* v. *Sieracki*, supra, 328 U.S. 85, 93-94.

Having been under the impression that compensation statutes were enacted to enlarge workers' rights, not diminish them, we fail to see how the combination of a demise charter and stevedore-employer relationship can purge the owner of his non-delegable duty and extinguish the worker's right and his lien.

The avenue of escape for the shipowner from the obligation of providing a seaworthy vessel heretofore required him to do his own stevedoring.[50] Now, all that is required is a demise charter arrangement. From the cases one can infer that this device is prevalent.[51]

We believe that if the doctrine of *Sieracki* is to remain alive, this Court must correct the ruling of the United States Court of Appeals for the First Circuit and adopt the reasoning of the Court of Appeals for the Second Circuit and the several District Court which imposed *in rem* liability upon the vessel in situations identical with the one presented in this appeal.

II. The Findings of the District Court that There Was No Demise Charter and that the Shipowner Was Liable *In Personam* Were Not Clearly Erroneous.

To be able to disagree with the holdings of *Cannella, Grillea, Reed* and *Leotta*, the court below had to first overcome the fact that the District Court had found the evidence "so meager in this respect that I can find no lawful basis for holding that the vessel was under a demise charter party to Bordas & Co."[52]

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[50] In Puerto Rico, two of the largest shipowners who maintain scheduled service now do their own stevedoring, viz., the Alcoa Steamship Co. and A. H. Bull S.S. Co.

[51] In addition to the cases cited we also refer to *Garcia* v. *The Beauregard*, D.C.D.N.J. 1961, 193 F. Supp. 662, which also rejected the *Vitoni holding* and followed *Grillea*, *Reed* v. *The Yaka* and *Leotta* v. *The S.S. Esparta*.

[52] Opinion and Order, R. 19.

Looking at the record, we find that the master, a citizen and resident of the Dominican Republic, testified that he was employed by Ruiz Pichirilo on the Dominican flag vessel. He referred to the stevedore as a third party. Although both Bordas and his proctor were present, no one cross-examined the master.[23]

The only other testimony relating to the alleged demise came from the stevedore-employer, who was characterized by the appellate tribunal as a layman.[24] In response to leading questions Bordas testified that there was a charter. At that moment the Court stated: "I can not give any credit to a witness answering leading questions because the attorney is the one that is testifying . . . . You have been insisting. This witness never mentioned anything about chartering the vessel, and you insisted on chartering, chartering —and then he had to say chartering." (R. 14).

After this, the witness testified that he paid a monthly fee, and all expenses for the vessel. However, he produced no records. No clause of the supposed charter are known. When did it begin, when did it end? What are the conditions of default? Who is responsible for surveys and repairs? Who pays insurance or how is it apportioned? We know as little about the "charter" as did the District Judge who said immediately upon the close of testimony: "That may be what you think, but I don't believe that Bordas is the operator of the boat." (R. 17)

Considering that demeanor evidence was available only to the trial judge, it seems to us that the appellate tribunal usurped the functions of the District Court by labeling the testimony that the District Judge refused to believe as inherently credible.

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[23] R. 10-11.

[24] *Ruiz Pichirilo* v. *Mayaguez Gunman*, 1 Cir. 1961, 290 F. 2d 812 at p. 813.

If, as the Court of Appeals says, the criteria of a demise charter are "possession, command and navigation",[55] we still must inquire, possession, command and navigation on behalf of whom!

This is especially so in cases of demise charters by parole because this Court has instructed:

> "Courts of justice are not inclined to regard the contract as a demise of the ship if the end in view can conveniently be accomplished without the transfer of the vessel to the charterer." *Reed* v. *United States*, 78 U.S. (11 Wall.) 591 at p. 601.

In doubtful cases courts lean to a holding against a demise charter[56] and the burden of proving an agreement, not in writing, rests heavily upon him who asserts it.[57] Even if under American law[58] a demise may be created by parole,[59] no modern example of such a practice exists in the cases apart from small harbor craft[60] unless there has been shown an intention to reduce the agreement to writing.[61]

In the light of these admonitions and returning to the words of *Reed* v. *United States*, *supra*, what ends have been accomplished by the transfer of the vessel? None.

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[55] *Reed* v. *United States*, 1870, 78 U.S. (11 Wall.) 591, 20 L. Ed. 220.

[56] *Ralli Bros.* v. *Isthmian Steamship Co.*, D.C.D. Md. 1940, 35 F. Supp. 986, 994.

[57] *American-Hawaiian Steamship Co.* v. *Willfuehr*, D.C.D. Md. 1921, 274 Fed. 214, aff'd. 280 Fed. 1023.

[58] *James* v. *Brophy*, C.C.A. 1st, 1895, 71 Fed. 310.

[59] Under English law it is "doubtful if a charter by demise can be constituted except by a document in writing." *Scrutton, Charterparties*, 1, note (a) 16 Ed. 1955.

[60] *The Willie*, C.C.A. 2nd, 1916, 231 Fed. 865.

[61] *United States Navigation Co., Inc.* v. *Black Diamond Lines*, C.C.A. 2d 1942, 124 F. 2d 508, cert. denied 315 U.S. 816, 62 S. Ct. 805, 86 L. Ed. 1214.

except to destroy the right and lien of the petitioner. Parenthetically, we note that in no other case has a demise charter been collaterally established by parole.

What occurred in the Court of Appeals was a trial *de novo*. This court has barred such a procedure.

McAllister v. *United States*, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20.

Reinstatement of the findings of the trial court would render it unnecessary to determine whether a vessel may be liable *in rem* to a longshoreman injured as a result of her unseaworthiness, if the longshoreman's employer is also the demise charterer. It would also leave for the future the question of whether a demise by parole may be collaterally established.

We feel that the District Court's findings were manifestly correct and supported by the evidence. We are also mindful of our obligation to our client, above all other considerations. Nevertheless, we would be reluctant to have the decision of the Court of Appeals reversed on the narrow ground that there was no clear error on the part of the District Judge.

The irreconciliability of viewpoints as to the correct interpretation of the maritime law can only be resolved by this Court, and should be resolved now, so as to avoid hopeless confusion. There is one particular reason why this Court should adopt the position of the Court of Appeals for the Second Circuit in this matter. That is that there is no more reason to expunge the security provided by the *in rem* remedy when the vessel is under a demise than when it is in the hands of the shipowner. He cannot discover the unseaworthy condition created by the charterer any easier than he can discover the unseaworthy condition brought into play by a stevedoring contractor.

Yet in the same way that he can insure against the risk, or contract for indemnity or be indemnified by operation of law for the conduct of the stevedore contractor, he can be protected in the case of a demise. He is not prejudiced by the imposition of liability.

If humanitarian justice underlies the doctrine of seaworthiness, it requires a reversal of the decision on appeal.

Conclusion

The findings of the trial court and the decree in favor of the petitioner against both respondents based on these findings should be reinstated. Even if this Court should hold that a demise charter of an ocean going vessel may be orally created on evidence as meagre as that presented to the trial court, the decision of the Court of Appeals for the First Circuit should be reversed, and *in rem* liability should be imposed upon the shipowner for the unseaworthy condition which caused petitioner's disability.

Respectfully submitted,

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